

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

Business Conduct Standards for)
Security-Based Swap Dealers and)
Major Security-Based Swap Participants)

File Number S7-25-11

**COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION AND
THE LARGE PUBLIC POWER COUNCIL**

The American Public Power Association (“APPA”) and the Large Public Power Council (“LPPC”) submit these comments in response to the Securities and Exchange Commission’s (“SEC” or “Commission”) proposed new rules, “Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants,” (“Proposed Rule”) published in the *Federal Register* on July 18, 2011.¹ Specifically, the APPA and LPPC comments concern the rules proposed for security-based swap dealers and major security-based swap participants (collectively, “SBS Entities”) in their dealings with special entities. As publicly owned entities, most APPA and LPPC members are “special entities” as defined in section 15F(h)(2)(C) of the Securities Exchange Act.

As set forth in detail below, we believe that it is very important that business conduct standards that generally follow the Proposed Rules be adopted both by the SEC and the CFTC. If the business conduct standards are not properly drafted, we believe that the number of counterparties willing to enter into swaps with special entities will decrease, resulting in an increase in the cost of swaps for special entities. While our members’ swaps will almost entirely be regulated by the CFTC, a consistent, workable set of business conduct standards is needed.

I. INTERESTS OF APPA AND LPPC

APPA is the national service organization representing the interests of not-for-profit, publicly owned electric utilities throughout the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hour sales to ultimate customers and do business in every state except Hawaii. APPA utility members are load-serving entities, with the primary goal of providing customers in the communities they serve with reliable electric energy at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of APPA-member electric utilities with the long-term interests of the residents and businesses in their communities.

¹ 76 *Fed. Reg.* 42,396 (July 18, 2011).

APPA's member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. These systems take various forms. Most are municipally-owned, and these utilities may be a department of the municipality or an independent authority established under state or local law. Other forms include political subdivisions of the state, such as public utility districts or public power districts; state-owned utilities, created under state statutes; and joint action agencies ("JAAs"), formed under state law to provide wholesale power supply and transmission service to distribution entity members. Thus most public power utilities fall under the Dodd-Frank Act's definition of "special entity."

The LPPC is an organization representing 25 of the largest locally owned and operated public power systems in the nation. LPPC members own and operate over 86,000 megawatts of generation capacity and nearly 35,000 circuit miles of high voltage transmission lines. Collectively, LPPC members own nearly 90% of the transmission investment owned by non-federal public power entities in the U.S. LPPC member utilities supply power to some of the fastest growing urban and rural residential markets in the country. Members are located in 11 states and Puerto Rico -- and provide power to some of the largest cities in the country including Los Angeles, Seattle, Omaha, Phoenix, Sacramento, Jacksonville, San Antonio, Orlando and Austin.

Members of the LPPC are also members of APPA. LPPC members are larger in size than other APPA members due to the size and population density of the communities to which they provide power. LPPC members often require larger, more complex and more diverse types of resources to serve their communities as well, and therefore LPPC members own and operate more complex generation and transmission assets than many other APPA members. However, despite being larger in size and resources, LPPC members' public service mission remains the same -- to provide reliable, safe electricity service, keeping costs low and predictable for customers while practicing good environmental stewardship.

II. COMMENTS

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) amended the Securities Exchange Act to give the Commission authority to regulate security-based swaps. New Section 15F of the Securities Exchange Act requires the Commission to adopt business conduct standards for SBS Entities in their dealings with counterparties who are special entities. Similarly, the Dodd-Frank Act gives the Commodity Futures Trading Commission ("CFTC") authority to regulate swaps, and requires the CFTC to adopt business conduct standards for swap dealers and major swap participants (collectively "Swap Entities") in their dealings with counterparties who are special entities. The CFTC has already proposed business conduct standards for Swap Entities (the "Proposed CFTC Rules"), and APPA and LPPC submitted comments recommending important changes to those rules that would provide more certainty in respect to the obligations established for Swap Entities, streamline the compliance process and reduce the regulatory burden on the parties. We are particularly concerned that the Proposed CFTC Rules could dramatically increase the burdens and potential liabilities imposed on Swap Entity counterparties to special entities to such an extent that those counterparties will either cease entering into swaps with special entities or will do so only at a cost that is significantly higher than what they charge other counterparties.

The members of APPA and LPPC are not-for-profit, governmentally-owned electric utilities in the United States that provide reliable electric energy to retail electric consumer/customers as a public service every hour of the day and every season of the year. APPA and LPPC members hedge their commodity and other commercial risks using energy and energy-related commodity and derivatives transactions to keep electric energy costs low and supply predictable, while practicing good environmental stewardship. Our members are not swap dealers or major swap participants, and are not financial entities. Prior to the Dodd-Frank Act, our members' hedging transactions -- other than those conducted on CFTC-regulated designated contract markets or on exempt commercial markets (or cleared by derivatives clearing organizations) -- were excluded or exempt from the CFTC's jurisdiction under the Commodity Exchange Act (the "CEA"). Our members engage in commercial energy commodity and derivatives transactions that may or may not be considered "swaps" under the CEA as amended by the Dodd-Frank Act of a type that we define as "Energy Commodity Swaps." Our members engage in such transactions only to mitigate or hedge the commercial risks that arise in the course of their public service activities.

Members of APPA and LPPC engage in commercial energy commodity and derivatives transactions with their traditional physical commodity counterparties, such as other electric utilities (both not-for-profit and investor-owned), merchant energy companies, natural gas producers and energy marketers active in the geographic service territories of our members. As we have commented in response to CFTC rule-makings, many of our transactions are "end-user-to-end-user," and do not involve financial entities either as counterparties or as intermediaries. Our members' commercial energy commodity transactions are often long-term and highly customized, with commercial credit risk management terms rather than financial markets "mark-to-market" daily cash margining provisions. The variations and permutations of primary economic terms in these commercial energy commodity transactions are myriad.

APPA and LPPC member utilities generally do not enter into security-based swap transactions, but APPA and LPPC are commenting on the Commission's Proposed Rule because we believe that the SEC's proposals related to transactions with special entity counterparties are a substantial improvement over the Proposed CFTC Rules. We were pleased to see that in issuing the Proposed Rules, the SEC reviewed the comments that had been submitted to the CFTC on the Proposed CFTC Rules and that the SEC and CFTC have coordinated efforts on these matters. Since the markets will be best served if the SEC and the CFTC adopt a consistent set of business conduct standards for transactions with special entities, we encourage the two regulatory agencies to work together and adopt standards along the lines of those in the SEC's Proposed Rules.

The Dodd-Frank Act's business conduct requirements related to transactions with special entities (including public power utilities) contain two key provisions: (a) a swap dealer or security-based swap dealer ("SBS Dealer") that acts as an "advisor" to a special entity must act in the "best interests" of the special entity; and (b) a swap dealer, SBS Dealer, a major swap participant, or a major security-based swap participant² that enters into (or offers to enter into) a

² Our comments as set forth below refer to SBS Dealers and major security-based swap participants but these comments apply equally to Swap Entities regulated by the CFTC.

swap with a special entity must determine that the special entity has a qualified independent representative. Our comments are organized by the following major topics: (1) advisors of special entities, (2) qualified independent representative requirement, (3) reliance on representations, and (4) consistency with CFTC proposals. Within each of these sections we have included responses to the relevant specific requests for comments that were included in the Proposed Rules.

Requirements for advisors.

The Dodd-Frank Act provides that a swap dealer or security-based swap dealer acting as an advisor to a special entity must act in the “best interests” of that entity. Since the “advisor” designation imposes significant duties, regulations must ensure that only those entities truly acting as “advisors” are captured by this designation. In particular, it is critical that certainty be provided to swap dealers and SBS Dealers that seek to enter into swaps with special entities to determine whether they are acting as an advisor to a special entity. Both the CFTC and the SEC have proposed rules stating that “advisor” status results when a dealer “recommends” that a special entity enter into a swap. However, the CFTC’s proposed definition of “recommend” is both broad and vague, raising concerns that dealers would be reluctant to bring proposals to special entities that involve swaps (such as proposing variable rate bond issues with interest rates that are effectively converted to fixed rates using an interest rate swap) for fear that this would obligate the dealers as “advisors.”

The SEC recognized the concern that a dealer could unintentionally become an “advisor” and that this concern could have a chilling effect on dealers’ potential interactions with special entities.³ Thus, the SEC proposed regulations to provide greater certainty to SBS Dealers. Most importantly, the SEC’s Proposed Rule provides certainty by allowing a disclaimer approach. This approach permits an SBS Dealer to establish that it is not acting as an “advisor” by satisfying three criteria: (1) the special entity states in writing that it will not rely on the advice of the dealer and that it will rely on advice from a qualified independent representative (which, as further discussed below can be based on representations of the special entity or its representative); (2) the dealer has a reasonable basis to believe that the special entity is advised by a qualified independent representative; and (3) the dealer discloses to the special entity that it is not undertaking to act in the “best interests” of the special entity. Since every swap between an SBS Dealer or major security-based swap participant and a special entity must involve a qualified independent representative and since the “disclaimers” of advisor status by the special entity and dealer are already typically included in standard swap agreements, this approach is workable and a significant improvement over the Proposed CFTC Rules.

While the SEC’s proposed facts and circumstances-based approach to determining whether an SBS Dealer has made a recommendation is an improvement over the Proposed CFTC Rule, this approach by itself will often not provide sufficient certainty. In the absence of the disclaimer approach, the facts and circumstances-based approach to the definition of “advisor” could lead to considerable uncertainty for SBS Dealers, the economic impact of which would be felt by special entities. Accordingly, any new limitations on the use of disclaimers by SBS

³ Proposed Rule at page 42,424.

Dealers must be accompanied by substantially greater specificity in the definition of “advisor.” Although APPA and LPPC support the disclaimer approach described above, we are concerned that certain of the specific comments requested by the SEC suggest the potential for the adoption of a significantly more restrictive approach than the “disclaimer” approach.

Qualified independent representative requirement.

The Dodd-Frank Act requires SBS Dealers and major security-based swap participants that act as a counterparty to a special entity to determine that the special entity has a qualified independent representative. Public power utilities that engage in swaps typically have risk management departments and employees experienced in evaluating energy derivatives. These employees have the sophistication to manage their utilities’ swap portfolios and should not be required to consult with an outside representative. With respect to interest rate swaps, the industry standard is to engage a third party swap advisor to assist the special entity. APPA and LPPC are pleased that both the CFTC and the SEC have proposed rules that define a special entity’s “independent representative” as being independent of the SBS Dealer and major security-based swap participant (and do not require the representative to be independent of the special entity) and to permit a special entity’s employee to serve as a qualified independent representative. This interpretation of “independent” is consistent with the statute and reflects Congressional intent, as was confirmed in a colloquy between Senator Blanche Lincoln and Senator Tom Harkin.⁴ The SEC should maintain this interpretation in its final rules.

Set forth below are the SEC’s requests for comments on a number of issues related to the independent representative requirement and our responses to these requests:

- *Should the Commission permit an independent representative that receives compensation from the proceeds of a security-based swap so long as the compensation is authorized by, and paid at the written direction of, the special entity? Why or why not?*

We believe that this method of compensation should be permitted as long as it is authorized by the special entity. It is not unusual for a swap advisor to be paid by the counterparty to the special entity for a variety of reasons but only at the direction of the special entity. There is no reason to prohibit this practice.

- *Is the interpretation of Section 15F(h)(5)(A)(i)(III) appropriate? Can and should independent representatives be required to be independent of the special entity entering into the security-based swap as well as independent of the SBS Entity? Why or why not? If an SBS Entity is relying on written representations from a special entity that is represented by an internal “independent representative,” should the SBS Entity be required to also obtain such representations from someone other than the independent representative?*

⁴ See footnote 218 of the Proposed Rule for the senators’ colloquy. The colloquy is also published at 158 Cong. Rec. S5903 (daily ed. July 15, 2010).

As to the question of whether to require that an independent representative be independent of the special entity, we answer this question with an emphatic “no.” The purpose of the independent representative rule was to ensure that a special entity was getting swap advice from a person other than the SBS Entity counterparty, not to create a requirement for the hiring of third parties. Although in the context of interest rate swaps it is common practice for public power and other governmental entities to engage third party swap advisors, in the energy context, it is very common for APPA and LPPC members to have internal hedging expertise to deal with transactions that occur on a daily basis. The SEC should not change the position on this issue that it and the CFTC have taken.

Further, we believe that it should be sufficient for the required representations to be made by the special entity and its employee representative.

We are concerned with the aspect of these rules that imposes the requirement to determine that a special entity has a qualified independent representative at the point when an “offer” to enter into a swap is made. First, clarification should be provided, with examples, of when the SEC considers an “offer” to be made. More importantly, we are concerned that, as a practical matter, the “offer” stage of a swap transaction will often be too early for the counterparty to ensure that the independent representative requirement is satisfied. While we recognize that the Proposed Rules follow the language of the Dodd-Frank Act, we believe that accommodation for practicality needs to be made: the independent representative requirement should be treated as satisfied if the counterparty satisfies the required representations at the time that the swap is executed. This requirement should also be treated as satisfied if the necessary representations are obtained on execution of a master swap agreement between the parties or prior to execution of a swap under the agreement.

The proposed definition of independent representative requires that (1) the representative not have been associated with the SBS Entity for one year, and (2) not more than 10 percent of the representative’s gross revenues over the prior year were received, directly or indirectly, from the SBS Entity. We believe that the one year test for association with the SBS Entity should be reduced to 6 months; 6 months is a sufficient period of separation. We also suggest the elimination of income from referrals from the gross revenue test. Referrals can be difficult to track. For example, a representative may have multiple referrals to a single special entity or the representative may not even be aware of a referral. The gross revenue test should also not take into account income paid by an SBS Entity on behalf of the special entity.

With respect to the proposal that independent representatives be subject to “pay to play” limitations, we believe that an exception to this proposal is needed for advisors that are employees of the special entity, given the employer-employee relationship.

- *Should the Commission require that the SBS Entity obtain written representations regarding the qualifications of the independent representative directly from the*

independent representative? From both the independent representative and the special entity? Why or why not?

In the case of an internal independent representative, we believe that it would be appropriate to obtain the representations either from that individual or from the special entity, or a combination of the two. With respect to a third party independent representative, the representations should be provided by the independent representative either directly to the SBS Entity or through a statement to the special entity acknowledging that the statement would be relied on by SBS Entities for purposes of the business conduct rules. We believe that these approaches balance the purposes of the business conduct rules with practical constraints (for example, the fact that a public power system may do a number of swap transactions in a day without time to obtain representation letters addressed to each SBS Entity). We also suggest that the required representations should be permitted to be set forth in a letter that may be relied on for the duration of the swap master agreement. However, in the case of representations from third party representatives we can see the merit of requiring periodic re-certifications (perhaps every two years).

- *Are there other potential reasonable means of establishing that a special entity's independent representative has the requisite qualifications, other than written representations, for which the Commission should consider providing guidance? If so, what means should such guidance address and how?*

We believe that it is essential that written representations be a permitted means of satisfying these rules.

- *Should the Commission require the SBS Entity to reevaluate (or, as applicable require a new written representation regarding) the qualifications of the independent representative periodically? If so, how often? Should such reevaluation be required for specific types of security-based swaps or in certain circumstances? If so, with respect to which types and in what circumstances?*

We suggest that the required representations should be permitted to be set forth in a letter that may be relied on for the duration of the swap master agreement. However, in the case of representations from third party representatives we can see the merit of requiring periodic re-certifications (perhaps every two years).

- *Should the Commission consider the development of a proficiency examination for independent representatives? Should such testing requirement be mandatory? Should it apply to both in-house and third-party independent representatives? Why or why not?*

There should not be a proficiency examination for in-house representatives—employee representatives have been thoroughly vetted when hired and are subject to regular performance reviews by their employers. In the case of third party representatives, we believe that additional guidance is needed. While a proficiency exam to ensure that third party representatives have a minimum level of knowledge is one approach, it need not be

the exclusive approach and, in fact, may provide a false sense of expertise. The special entity would normally check the resources and background of the principals. For example, has the representative executed derivative transactions as a dealer, advisor, or principal and does the representative have the necessary tools to perform its obligations (e.g. swap pricing models etc.)? However, any such requirements must not, directly or indirectly, impose additional costs or burdens on special entities or additional diligence requirements on SBS Entities.

- *Should the Commission require that independent representatives be registered with the Commission as municipal advisors or investment advisers, or otherwise subject to regulation, such as banking regulation, for example?*

With respect to both the notion of a proficiency examination for independent representatives and registration of representatives with the SEC, we believe that a distinction should be made between representatives that are employees of the special entity and third party representatives. We do not believe that proficiency examinations or SEC registration are necessary or appropriate for employee representatives—employee representatives have been thoroughly vetted when hired and are subject to regular performance reviews by their employers. For third party representatives, we support some form of regulation. However, we believe that any regulatory requirements, including whether third party representatives should be registered with the SEC as municipal advisors or investment advisers, should be first issued in the form of a notice of proposed rulemaking.

- *Should the Commission require an SBS Entity to check publicly available databases, such as FINRA's BrokerCheck and the Commission's Investment Adviser Public Disclosure program, to determine whether an independent representative is subject to a statutory disqualification? Why or why not? If so, which databases should be required to be consulted? Should such databases include sources outside the Commission and self-regulatory organizations, such as databases maintained by other regulators or federal or state officials? Why or why not? If so, which outside databases should be required to be consulted? Should the Commission require an SBS Entity to conduct any other type of inquiry to determine whether an independent representative is subject to a statutory disqualification? Why or why not?*

While we support the notion that publicly available databases should be reviewed to determine whether a third party representative is subject to a statutory disqualification, we are reluctant to see requirements imposed on SBS Entities that require that they perform diligence beyond review of the written representations related to qualified independent representative status. We are not familiar with all of the databases mentioned but would limit review to those databases that are broadly available. Review of multiple databases should not be required. These issues could be dealt with by having the third party representative represent that it is not subject to statutory disqualification, is not under investigation, and is not listed on the publicly available databases described above.

- *Should the independent representative be required to be subject to some form of regulation (e.g., as an investment adviser or an ERISA plan fiduciary) under which the independent representative has a duty to act in the best interests of the special entity (or some similar requirement)?*

Third party independent representatives should be subject to some form of regulation and a fiduciary duty imposed upon them (as the Dodd-Frank Act does) if they will serve as an independent swap representative to special entities. However, any such requirements must not, directly or indirectly, impose additional costs or burdens on special entities or additional diligence requirements on SBS Entities. In addition, we believe that any such requirements should first be issued in the form of a notice of proposed rulemaking.

- *Should the Commission impose specific requirements with respect to this obligation, such as the content of the disclosures that should be made by the independent representative? If so, what requirements and why? Should the “appropriate disclosures” include disclosures regarding the qualifications of the independent representative, in addition to disclosures regarding the security-based swap? Why or why not? Should such disclosures address other subjects not directly related to the security-based swap? Which ones and why?*

We do not believe that the SEC should impose specific requirements regarding the content of the disclosures that the independent representative should make. We also do not believe that the SEC should create mandated disclosures. There are too many types of swaps and circumstances for a set of mandated disclosures. We would not object to the SEC providing examples of disclosure for a relatively simple swap agreement and the rules and examples should make clear that each of the requirements for qualification as an independent representative can be satisfied through representations. With respect to representations related to the requirement that the representative provide written representations to the special entity, we believe that the two examples set forth in the Proposed Rules (that is, that the representative is required by law or contract to review swap pricing and appropriateness, and that the representative will document its basis for conclusions related to swap pricing and appropriateness) are reasonable approaches to this requirement. We believe that it would be the customary practice for a special entity that hires a third party representative to obtain written information on that person’s qualifications and do not believe that the SEC needs to mandate this practice.

- *If the SBS Entity is not relying on written representations, should the Commission allow a presumption that an in-house independent representative, by virtue of its employment with the special entity, will make appropriate disclosures of material information to the special entity? Why or why not?*

The presumption that an in-house independent representative will make appropriate disclosures to its employer is the correct assumption. The in-house representative has been hired to perform a hedging and risk control function, is subject to direct control by his or her employer and is subject to regular review. There is no reason to adopt

regulations that necessitate anything beyond the presumption that the employee will make proper disclosures.

Whether the independent representative is an employee or third party, the Proposed CFTC Rules would require that the Swap Entity perform substantial amounts of diligence to ensure that the special entity's independent representative was "qualified." This would make the CFTC's rules close to unworkable as a practical matter. The SEC's Proposed Rule would, instead, permit the SBS Entity to rely on representations to determine that the special entity has a qualified independent representative. This is a major improvement over the Proposed CFTC Rules and one which we strongly endorse.

Reliance on representations.

For purposes of the permitted "disclaimer" approach to determining whether an SBS Dealer is acting as an advisor to a special entity and the determination of whether a special entity has a qualified independent representative, the Proposed Rules permit reliance on representations. The SEC asks whether it should allow such representations to be relied on (1) as long as the SBS Entity does not know that the representations are inaccurate or, instead, (2) only if the SBS Entity does not have information that would cause a reasonable person to question the accuracy of the representations. APPA and LPPC believe that the SEC should use the first approach, permitting continued reliance in the absence of actual knowledge to the contrary, as it is clearer and not subject to second-guessing (with "20-20 hindsight") as to what a "reasonable" person would question. Particularly with respect to the independent representative requirement, an approach requiring Swap Entities/SBS Entities to make judgment calls regarding the representations of a special entity or its advisor would potentially give the counterparty to the special entity inappropriate control over a special entity's representative. We believe that this is not an appropriate approach to take.

In addition, the "reasonable person" approach could undermine the ability of SBS Dealers and major security-based swap participants to rely on representations without still having to perform substantial diligence. We believe that the appropriate approach is to permit a SBS Dealers and major security-based swap participants to rely on representations as long as they do not know that the representations are inaccurate. We also do not believe that there are particular circumstances where SBS Dealers and major security-based swap participants should be required to obtain additional information or perform additional diligence. Again, this would defeat the purpose of permitting reliance on representations.

As suggested in the SEC's request for comments, we are concerned that requiring additional diligence or inquiry would unreasonably limit the willingness of SBS Dealers and major security-based swap participants to provide special entities with swaps or drive up the cost of such swaps for those still willing to provide such swaps. The business conduct rules already create additional burdens for SBS Dealers and major security-based swap participants dealing with special entities and further burdens should be minimized to the greatest extent possible.

Other Provisions.

The Proposed Rules would prohibit SBS dealers from engaging in swaps with municipal entities if certain political contributions have been made. Given the uncertainty of the breadth of the SBS dealer and “swap dealer” definitions, we urge that this type of pay-to-play rule not be imposed at this time. While financial institutions that deal with municipal entities are more likely to have compliance procedures in place to deal with pay-to-play rules, other entities that may ultimately be considered SBS dealers or swap dealers are much less likely to have such systems in place or even be familiar with these types of rules. We suggest that the pay-to-play prohibition be delayed for the present, but be considered after the “dealer” definitions are finalized.

Consistency with Proposed CFTC Rules.

APPA and LPPC urge the SEC to coordinate with the CFTC on the final business conduct standards particularly in regard to the provisions related to transactions with special entities. The SEC’s Proposed Rules on these issues have much to recommend because they are practical, workable, and provide dealers with the certainty they need to continue to interact with special entities. They also provide a better balance between regulatory objectives and possible unintended market consequences. APPA and LPPC encourage the SEC to maintain this practical approach in its final rules. Further, if the SEC and CFTC adopt inconsistent business conduct rules, we believe that swap dealers that are regulated by both the CFTC and SEC will adopt a worst-case, lowest common denomination approach with the business conduct rules.

We appreciate the opportunity to submit comment on these rules and would be happy to discuss them further.

WHEREFORE, APPA and LPPC submit these comments for the Commission's consideration in this docket.

Respectfully submitted,

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LARGE PUBLIC POWER COUNCIL



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